Filed 1/23/19 P. v. Sexton CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WOODROW RAYMOND SEXTON, Defendant and Appellant.	G055192 (Super. Ct. No. 17NF1083) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John S. Adams, Judge. Affirmed.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Tami Hennick and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Woodrow Raymond Sexton of possessing methamphetamine for sale (Health & Saf. Code, § 11378), and possessing heroin for sale (Health & Saf. Code, § 11351). In a bifurcated bench trial, the court found Sexton had suffered a prior strike conviction (Pen. Code, §§ 667, subd. (d) & (e)(1), 1170.12, subd. (b), (c)(1)).

Sexton contends the prosecution presented insufficient evidence to show he intended to sell the drugs and the trial court erred when it admitted evidence he previously had been arrested for selling drugs. He also argues the court misinstructed the jury, the prosecutor committed misconduct during her closing argument, and the cumulative effect of these errors requires reversal. Alternatively, he asserts we must strike the probation condition requiring him to submit to a warrantless search of his electronic devices because it is unconstitutionally overbroad.

We reject all of Sexton's claims and therefore affirm the judgment.

I.

FACTS

A. *The Prosecution's Case-in-Chief*

In April 2017, Fullerton police officer Matthew Kalscheuer stopped Sexton after seeing him riding his bicycle eastbound in the westbound lanes of a busy street. Sexton had a knife in his pocket, and Kalscheuer ordered Sexton to throw the knife to the curb. Sexton complied and told Kalscheuer he also had a stun gun in his backpack.

Kalscheuer searched the backpack and found a stun gun, a working digital scale, another knife, new and used syringes, a spoon, and a lighter. He also found $539 in currency: twenty-one $20 bills, ten $10 bills, three $5 bills, and four $1 bills. Kalscheuer testified he could not recall if Sexton had a cell phone, nor whether he searched one. Subsequent evidence showed a cell phone actually was collected from Sexton, and Sexton later testified it was his.

Kalscheuer searched Sexton's pant leg, and found 3.3 grams of heroin in a velvet sack and 1.4 grams of methamphetamine in a lip balm container. Before finding the drugs, Kalscheuer asked Sexton how much he used, and Sexton said "he ha[d]n't used." Sexton did not appear to be under the influence of either heroin or methamphetamine during this encounter.

Based on everything he found and observed, Kalscheuer opined Sexton possessed both drugs for sale. He explained, "[t]hese items are together because a . . . person that sells narcotics carries weapons to protect themselves, hence the knife and stun gun. And the digital scale to weigh the narcotics out for certain weights, either like you have your 0.5 grams or 1 gram . . . which are commonly sold, as well as the syringes. [¶] Sometimes drug sellers like to carry around products to help their users use the drug or test it while they're selling them the product, hence the syringes. And as well as the heroin and methamphetamine." Kalscheuer considered the possibility Sexton possessed the drugs for personal use, but the "3.1 grams of heroin . . . roughly an eight ball,[1]" was "commonly used or sold to drug sellers to further break it up or cut it . . . into smaller amounts to either profit from or use it themselves. But most of the time they sell most of the product and use very little of that in order to continue making a profit on their habit." He also pointed out "most people don't have methamphetamine and heroin on them."

As for the cash, he considered the smaller denomination bills significant because "buyers of narcotics don't typically just hand them twenties or hand them one hundreds. They have smaller denomination[s]. They have their ones, they have the fives." Kalscheuer testified he never met a simple "drug user that buys in bulk," because of their fear they might be "charged with sales."

---

[1] In the vernacular, an "eight-ball" is one-eighth of an ounce. For our metric system-averse readers, there are 28.35 grams in an ounce, and an "eight-ball" would therefore be 3.54 grams. (Evid. Code, §§ 452, 459.)

On cross-examination, Kalscheuer acknowledged he knew Sexton was an addict, and he agreed the amount of Sexton's heroin might last an addict several days, depending on his tolerance level. He also admitted it was less expensive to buy drugs in bulk, and it was possible an addict might buy three grams for personal use. But, he emphasized his opinion Sexton possessed the drugs for sale was not solely predicated on specific amounts, but was instead based on the "totality of the circumstances."

On redirect examination, Kalscheuer testified he previously had contacted Sexton in December 2016, about four months before the arrest in this case. During that encounter, Kalscheuer found Sexton in a tent and in possession of two "meth pipes" and a gram of methamphetamine. Because he only found pipes, a small amount of methamphetamine, and no scale, Kalscheuer believed Sexton possessed this methamphetamine for personal use. Consequently, he wrote Sexton a misdemeanor citation and released him.

Fullerton narcotics officer Donald Blume testified as a drug expert. He explained a heavy user of methamphetamine might use a half to a full gram a day. A typical dose would be a $5 "nickel" (0.05 grams) or a $10 "dime" (0.1 grams). Heroin dosages were similar. Heroin was typically injected or smoked. If injected, the heroin was typically placed on a spoon and melted before being loaded into a syringe.

Sexton's 3.3 grams of heroin would have cost about $250, and could be divided into 66 $5 doses. The 1.4 grams of methamphetamine would have cost about $60 to $70, and could be divided into 28 $5 doses. Blume explained some people use both heroin and methamphetamine, but it was not common as the drugs' effects counteracted each other. Most everyday users carried a "dime" baggie or a "20."

Blume thus considered the amount of heroin and methamphetamine in this case a "larger amount." He further opined the drugs were possessed for sale, basing his opinion on the quantity, the presence of multiple drugs, the scale, the weapons, and what he characterized as a substantial amount of cash.

B. *The Defense Case*

Sexton testified he possessed the drugs for personal use and not for sale. He explained his life had spiraled out of control after a motorcycle accident led to the loss of his right leg. He used a gram to a gram and a half a day of heroin to combat physical pain, and a gram of methamphetamine daily to alleviate the drowsiness caused by the heroin. He used heroin three times daily: in the morning after he awakened; in the afternoon; and in the evening before he went to bed.

Regarding the other physical evidence, Sexton stated he used the utility knife found in his pocket for various tasks, like cutting tape off his pant leg. He held the other knife and the stun gun for protection because he had been "ripped off out of [his] tent on multiple occasions."

Sexton explained he bought in bulk to get the best price because, with his habit and only a $2,000 monthly income, he had to "make it last through the month." He used the scale to purchase drugs, and also to measure out his heroin so he did not use too much. He claimed his normal purchase was 12 grams of methamphetamine twice a month for a bulk price of $375, but on cross-examination Sexton testified he bought his methamphetamine only once a month, and the cost of two ounces (56 grams) was only $200-$300. As for heroin, he estimated 40 grams as his monthly supply, but claimed he normally bought only 12 grams at a time.

He received a little over $2,000 a month in disability payments, which came on an ATM card, and used the card to withdraw cash because he did not have a bank account. He withdrew $1,000 at the beginning of each month, and $800 in the middle of the month to save on withdrawal fees. Thus, the cash he held when he was arrested came from an ATM, not from drug sales.

Sexton testified he gave the passcode to his cell phone to Kalscheuer and that the officer spent some time looking at its contents. He had "no clue" what was on his phone at the time.

On cross-examination, Sexton admitted he had been using drugs since the age of 13 and "probably [] sold something . . . here and there." He acknowledged he previously was arrested for selling drugs in October 2016, but pointed out he was never convicted. He admitted that on this October occasion he was found with 40 grams of methamphetamine, two or three grams of heroin, 30 empty baggies, two scales, and weapons, but claimed these drugs were also for his personal use.

Recalled by the defense, Kalscheuer acknowledged that, during the December 2016 tent contact with Sexton, he actually also had found a scale, 50 or so plastic baggies, and possibly a folding knife. In addition, while Sexton had initially denied using methamphetamine for two months on that occasion, he eventually admitted to Kalscheuer it was his.

C. *Prosecution's Rebuttal Case*

Following Sexton's testimony, the prosecutor moved to present a rebuttal witness under Evidence Code section 1101, subdivision (b).[2] Her offer of proof was this witness would testify to the full details of the October 2016 police contact with Sexton, where the evidence would show he possessed methamphetamine and heroin for sale on that occasion. She explained that, after Sexton's testimony he did not sell drugs and instead was solely a drug user, the central issue had become whether Sexton possessed the drugs in this case with the intent to sell them. She argued if Sexton harbored an intent to sell in October, under facts similar to the current case, it was probative on whether he had the same intent the following April. Defense counsel objected, arguing the two cases were factually dissimilar, and the proposed testimony would constitute improper propensity evidence, under section 1101, subdivision (a).

---

[2] Evidence Code, section 1101, subdivision (a), generally prohibits the introduction of a criminal defendant's prior acts "when offered to prove his or her conduct on a specified occasion." However, subdivision (b) provides an exception for evidence a person did another act "when relevant to prove some fact [,] such as . . . intent [,] other than his or her disposition to commit such an act."

The court granted the prosecutor's motion, stating: "The defendant certainly opened this door wide open with his own testimony with regard to his use of drugs, his adamance about never selling drugs, and the implications that can be made that perhaps he was."

Thus, Fullerton police officer Jonathan Alvaradejo testified regarding the October 2016 incident. On that occasion, Alvaradejo saw Sexton in the back seat of his Ford Explorer, parked behind a Target store. Another man stood next to the SUV's open door. The men spoke to each other and made "hand movements back and forth."

Alvaradejo searched the Explorer and in a toolbox found three bags of methamphetamine totaling 40 grams in weight, two scales, 30 small sandwich baggies, and some syringes and spoons. He also found two baggies of heroin containing one gram each in Sexton's coin pocket. Like his testimony in the current case, Sexton told Alvaradejo the drugs were all for personal use, that it was cheaper to buy in bulk, and that he tried to make the drugs last a month. Sexton said he paid for drugs with his "Social Security check." He denied selling drugs, but admitted he shared methamphetamine — but not heroin — with his friends without charging them.[3]

Based on his experience with drug users, Alvaradejo opined Sexton possessed the methamphetamine in that incident for sale.

II.

DISCUSSION

A. *Sufficient Evidence Supports Sexton's Convictions*

Sexton first claims there was insufficient evidence he possessed his drugs with an intent to sell and not for his personal use. Not so.

---

[3] "Sharing" methamphetamine with friends is itself a felony violation of the same Health and Safety Code section as selling it. (See Health & Saf. Code, § 11379 ["[E]very person who transports, imports into this state, sells, furnishes, administers, or *gives away* . . . [methamphetamine] . . . shall be punished by imprisonment . . . for a period of two, three, or four years." (Italics added.).)

"Unlawful possession of a controlled substance for sale requires proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character." (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746 (*Meza*).) Here, Sexton only challenges the intent element.

In a sufficiency challenge, "we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).) In a circumstantial evidence case, we must accept any logical inferences the jury might have drawn from that circumstantial evidence, because "it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) Put simply, "[w]here the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence." (*Meza, supra,* 38 Cal.App.4th at p. 1747.)

Moreover, even if the defense evidence is contrary, "[w]e resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Instead, it is the jury that weighs the evidence, assesses witness credibility, and resolves conflicts in the testimony. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*Zamudio, supra,* 43 Cal.4th at p. 357.)

Both Kalscheuer and Blume testified that, based on the quantity of the controlled substances seized, the scales, weapons, and paraphernalia, Sexton possessed both the methamphetamine and the heroin with the specific intent to sell at least some of it. "It is well-settled that '. . . experienced officers may give their opinion that the

narcotics are held for purposes of sale based upon such matters as quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld.' [Citations.]" (*People v. Parra* (1999) 70 Cal.App.4th 222, 227.) Furthermore, the testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to establish a fact and support a conviction. (*People v. Allen* (1985) 165 Cal.App.3d 616, 623; Evid. Code, § 411; CALCRIM No. 301.)

Sexton's claim notwithstanding, the absence or presence of any or all of the traditional indicia of possession for sale — such as anachronistic pay-owe sheets in the era of smartphones — is not dispositive, and defendant points us to no authority to the contrary. Rather, in drug possession cases, experienced officers properly may opine drugs are held for sale based upon such matters as the quantity and the normal use of an individual. "Thereafter, it is for the jury to credit such opinion or reject it." (*People v. Harris* (2000) 83 Cal.App.4th 371, 374-375.) So too here. The officers' testimony in this matter, including Blume's expert opinion and the underlying facts upon which it was based, provides substantial evidence from which a jury reasonably could find Sexton possessed both the methamphetamine and the heroin for sale. The fact Sexton testified differently does not affect this conclusion because it is for the jury, not the reviewing court, to assess the credibility of the witnesses and make the ultimate determination of whom to believe. (*People v. Dowl* (2013) 57 Cal.4th 1079, 1092 ["[T]o be sure, defendant offered explanations for some of [the] circumstances, but the jurors did not have to believe them"].) Substantial evidence supports the jury's verdicts.

B. *The Trial Court Did Not Err by Allowing the Prosecutor to Cross-Examine Sexton About His October 2016 Arrest*

Sexton next argues the trial court prejudicially erred by permitting the prosecutor to impeach him on cross-examination with the details of the October 2016 incident. We are not persuaded.

Before trial, Sexton moved to exclude "[Evidence Code section] 1101, [subdivision] (b) evidence or potential 1101 [subdivision] (b) evidence"[4] of a prior police contact, which his counsel described as "a prior that was never charged." The prosecutor responded she did not intend to present evidence of the prior incident in her case-in-chief, but the prior contact evidence might become relevant later if Sexton testified.

After Sexton testified he did not possess the drugs for sale, that he had never sold drugs, and that he usually only bought 12 grams of methamphetamine at a time, the prosecutor sought to impeach him by questioning him about details of the October incident where Sexton was found with 40 grams of methamphetamine, 2 grams of heroin, and other sales indicia. The trial court ruled Sexton's testimony on direct examination had opened the door to such impeachment.

The record shows trial counsel failed to raise any objection to the impeachment evidence, including one under Evidence Code section 352.[5] Instead, he argued what Sexton testified to, and whether the prosecutor's proposed impeachment would actually impeach.

Consequently, he has forfeited that argument on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 433 [defendant's failure to make a timely and specific objection on the ground asserted on appeal makes that ground not cognizable]; Evid. Code, § 353 ["A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless . . . [t]here

---

[4] Evidence Code, section 1101, subdivision (b), does not involve *impeachment* evidence. Indeed, Evidence Code, section 1101, subdivision (c), specifically states: "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

[5] That section provides in pertinent part: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion.*"], italics added.)

Contrary to Sexton's characterizations on appeal, the trial court did not permit — and the prosecutor did not elicit — impeachment with mere evidence of an October arrest. Rather, the prosecution's focus was to evince the circumstances *underlying* that arrest. While the prosecutor began by asking Sexton if he remembered being arrested for selling drugs in October 2016, her cross-examination continued for another 30 pages of questioning, repeatedly returning to the underlying details of the October incident. Consequently, Sexton's appellate argument regarding the improper use of *arrests* for impeachment purposes does not fully reflect what the prosecutor did here. The fact Sexton incidentally was arrested during this encounter is actually of no moment considering the facts underlying that arrest.

Sexton cites *People v. Williams* (2009) 170 Cal.App.4th 587, 610 (*Williams*), for the proposition "that evidence of prior arrests that did not result in convictions was inadmissible either as proof of guilt or for impeachment," and in turn cites *People v. Medina* (1995) 11 Cal.4th 694, 769 (*Medina*), and *People v. Anderson* (1978) 20 Cal.3d 647, 650 (*Anderson*), in support.

He fails to place the quoted passage from *Williams* in context, however, because there the court prefaced the quoted remark with: "Generally, evidence of *mere arrests* that do not result in convictions is inadmissible because such evidence invariably suggests the defendant has a bad character." (*Williams, supra,* 170 Cal.App.4th at p. 609, italics added.) The crucial focus in *Williams,* therefore, concerns "mere arrests."

The underlying facts in *Williams* are quite unlike those in Sexton's case. In *Williams,* the defendant argued on appeal "it was error to admit evidence about *dozens* of contacts defendant and fellow gang members had with law enforcement, regardless of whether those contacts had led to convictions or even to arrests, and regardless of

whether the evidence had any reliable basis." (*Williams, supra,* 170 Cal.App.4th at p. 595, italics added.) Furthermore, "[s]ome of the crimes and incidents were introduced multiple times and for multiple purposes, including (1) under Evidence Code section 1101, subdivision (b), (2) as predicate crimes for the gang enhancements and substantive gang crime, and (3) as the basis for expert opinion testimony." (*Id.* at p. 598, fn. 5,) Significantly, none of these "mere arrests" was offered for impeachment purposes. *Williams* is therefore inapt.

Similarly, Sexton's reference to *Medina, supra,* 11 Cal.4th 694, is also misplaced. During the penalty phase of that capital case, the prosecutor on cross-examination of the defendant's sister elicited testimony defendant "'was arrested numerous times before 1968 for violent actions on his part.'" (*Id.* at p. 769.) She also agreed that her brother "'had a fairly extensive contact with the criminal justice system before he ever went to San Quentin.'" (*Ibid.*.) Our Supreme Court acknowledged "that *mere arrests* are usually inadmissible, whether as proof of guilt or impeachment . . . , or as aggravating penalty phase evidence." (*Ibid.*, italics added.) "The trial court had permitted the testimony on the theory that it tended to rebut [sister's] direct testimony that defendant's violent acts commenced after he was released from prison. But evidence of mere 'arrests' for violent conduct is not proper *rebuttal* evidence for this purpose." (*Ibid.,* italics added.) Once more, this is not what happened in Sexton's case.

Finally, Sexton's reliance on *Anderson, supra,* 20 Cal.3d 647, is also inapposite. In *Anderson,* during cross-examination of the defendant "the prosecutor was permitted to elicit the information that [defendant] twice had been arrested with [codefendant] on other *unspecified charges*. The prosecutor's theory of relevancy was that the evidence of prior 'joint' arrests established a 'close affinity' between the codefendants, a fact which, it was contended, bore on their credibility by implying a bias or prejudice." (*Id.* at p. 650, italics added.) Thus, like *Williams* and *Medina* — and unlike Sexton's case — the focus of the evidentiary error was on the defendant's "mere

arrests," and not on the details underlying those arrests. (See *Anderson, supra,* 20 Cal.3d at p. 651 ["Here the evidence shows only 'arrests'"].)

The *Anderson* court found reversible error when the trial court permitted the prosecution to introduce evidence of these arrests because it was a close case and took several days of jury deliberations. But for the admission of the prior arrests, the court concluded, it was reasonably probable the jury would have believed the defendants' version of the events and rendered a more favorable verdict. (*Anderson, supra,* 20 Cal.3d at p. 651.) Here, on the other hand, this was not a close case, and the jury reached its verdict after only an hour of deliberation.[6]

More importantly, *Anderson* was decided at a time when Evidence Code section 787 prohibited evidence of prior specific acts of misconduct to attack a witness' credibility. (See *Anderson, supra,* 20 Cal.3d at p. 650.) However, the "Right to Truth in Evidence" provision of Proposition 8, adding article I, section 28, subdivision (d), to the California Constitution, effectively repealed Evidence Code section 787 in criminal cases. (*People v. Harris* (1989) 47 Cal.3d 1047, 1080-1082 (*Harris*), disapproved on other grounds in *People v. Wheeler* (1992) 4 Cal.4th 284, 299.) Consequently, *Anderson* simply does not assist Sexton here.

People v. Kennedy (2005) 36 Cal.4th 595, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459, is instructive. There, the defendant's friend testified on cross-examination he had never seen defendant carry a gun. The prosecutor on redirect elicited testimony from the friend that he, defendant, and another person previously were arrested in an incident where police seized two pistols. The friend denied the guns belonged to him. (*Kennedy, supra,* 36 Cal.4th at pp. 619-620.) "We reject defendant's contention that the prosecutor's questioning was designed to elicit inadmissible evidence of a propensity by defendant to have guns. . . . [T]he questioning

---

[6] The jury retired to the jury room at 1:42 p.m. and, at 2:45 p.m., informed the bailiff they had reached verdicts.

was proper to impeach [the friend] because [his] admission that he and defendant were arrested in a car in which guns were found raised doubts as to the veracity of [his] previous statement on cross-examination that he had never seen defendant carry a gun. [¶] Nor, contrary to defendant's argument, does admission of that testimony violate the evidentiary limitations on the use of evidence of specific instances of prior misconduct. Those restrictions do not apply to evidence offered to support or attack the credibility of a witness. [Citation.])" (*Id.* at p. 620.)

Thus, as here, "[w]hen a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." (*People v. Cooper* (1991) 53 Cal.3d 771, 822 (*Cooper*).) A defendant who elects to testify has no right to cloak himself in a false aura of credibility. (*People v. Mayfield* (1997) 14 Cal.4th 668, 754-755, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.; see *People v. Westek* (1948) 31 Cal.2d 469, 477-478 [especially true if a defendant asserts he has never committed an offense of the kind charged].) "Although a defendant cannot be compelled to be a witness against himself, if he takes the stand and makes a general denial of the crime with which he is charged, the permissible scope of cross-examination is 'very wide.' [Citation.]" (*Cooper, supra*, 53 Cal.3d at p. 822.) As a result, a testifying defendant properly may be impeached with evidence that includes prior uncharged unlawful acts that would be otherwise inadmissible. (Evid. Code, §§ 780, 1101, subd. (c); cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 479-480 [witness's admission to drug use permits prosecution to inquire into the facts and circumstances surrounding that admission for impeachment purposes].)

Sexton acknowledges a trial court has broad discretion in determining whether to admit impeachment evidence, including whether it is subject to exclusion

under Evidence Code section 352. (*People v. Turner* (2017) 13 Cal.App.5th 397, 408.) We review the court's admission of such evidence for an abuse of discretion. (*Ibid*.) Here, we cannot say the trial court abused its discretion by finding Sexton had opened the door to impeachment following his direct examination. Thus, the trial court did not err in permitting Sexton's impeachment with the underlying details of the October arrest.

C. *Prosecutorial Misconduct*

Sexton next argues the prosecutor prejudicially erred by: (1) asking him on cross-examination why he had not produced certain potential exculpatory evidence; and (2) during closing argument improperly suggesting to the jury Sexton made profits from selling drugs to people facing "difficulties and struggles with addiction." Alternatively, to the extent defense counsel did not object to one of these alleged prosecutorial errors, Sexton argues he received ineffective assistance of trial counsel. None of these claims has merit.

1. *The Improper Cross-Examination Claim Was Forfeited and Counsel Was Not Ineffective for Failing to Object*

Sexton asserts the prosecutor erred by cross-examining him about why he had not introduced possible exculpatory evidence of the contents of his cell phone. According to Sexton, this question improperly shifted the burden of proof because it implied that he had a duty to produce exculpatory evidence. Alternatively, Sexton argues his trial counsel's failure to object to the prosecutor's questioning constituted ineffective assistance of counsel.

During cross-examination of Kalscheuer, trial counsel elicited testimony cell phones often have significance in drug sales cases. Yet Kalscheuer could not recall Sexton having a cell phone or whether he searched it. Sexton testified that not only had Kalscheuer seized his cell phone, but he had given him the passcode and Kalscheuer searched it.

When impeached with photographic evidence showing a cell phone was actually collected from Sexton and booked into evidence, Kalscheuer stated he "must have" collected the phone, but insisted he still did not remember, and he was sure he did not search the phone. He admitted in some cases it would be important to do so "if I had a legal way of searching the phone, whether it be [with] consent or a warrant. . . ."

Similarly, Blume testified on cross-examination cell phones can be important evidence in drug sales cases and, if a cell phone were seized, normally he would "try" to "check it" for text messages. This is because drug dealers no longer use paper records, i.e., the "outdated" pay-owe sheets, to keep track of their transactions, but instead use text messaging and their cell phones for "correspondence" and to store records.

No evidence was presented regarding the contents of Sexton's cell phone, and defense counsel's cross-examination of both prosecution witnesses adroitly implied that had there been any inculpatory evidence on the phone, the prosecution would have introduced it.

On cross-examination of Sexton, the prosecutor attempted to counter such implication, and asked Sexton if it was instead he who was in the best position to produce any *exculpatory* evidence contained on his cell phone:

"[Prosecutor]: My question, Mr. Sexton, was what text messages were in your phone that Officer Kalscheuer didn't want us to know about that would have shown that you were simply possessing and not, in fact, selling?

"[Sexton]: I have no clue what was on my phone. I don't remember what was on my phone. . . . I don't remember. This was back in [*sic*] April 16."

"[Prosecutor]: You'd agree that you're the best person to access your phone, right? You've got the pass code to your phone, your attorney can access [the] phone for you, he took photographs of your phone or his investigator did. [¶] [Relevance objection overruled] [¶] You're the best person to access your phone, you're

the one that has the pass code; you can tell your attorney to go fish out those message[s] that show you're only buying the drugs and not selling them?

"[Sexton]: I can tell him that? I don't . . .

"[Defense counsel]: Objection. This is argumentative.

"[The Court]: Sustained, counsel.

"[Sexton]: I have never given [my attorney] my pass code."

Later, the trial court instructed the jury: "[Attorneys'] questions aren't evidence. Only the witness's answers are evidence. [¶] Their questions were significant only to the extent that they may have helped you better understand the witness's answers. Don't assume something is true just because one of the attorneys may have asked a question in such a way that suggested it was true. [¶] Now, during the trial the attorneys objected here and there to questions, they moved to strike answers, I ruled on those objections according to the law. *If I sustained an objection, you must ignore that question.* [¶] And if the witness was not permitted to answer, don't guess what the answer might have been or why I ruled the way I did." (Italics added.)

On appeal, Sexton now argues the prosecutor's unanswered *question* improperly shifted the burden of proof because it implied he had a duty to produce exculpatory evidence. Not so.

It is well-settled a "prosecutor may comment '"on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses."' [Citation.]" (*People v. Cornwell* (2005) 37 Cal.4th 50, 90, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) If such comment in closing argument is not improper, we see no reason it would be when a prosecutor asks the defendant why potentially exculpatory evidence was not brought forward.

Sexton reliance on *People v. Wagner* (1975) 13 Cal.3d 612, 618 (*Wagner*) is unavailing. There, the Supreme Court concluded the prosecutor improperly impeached the defendant about specific acts of misconduct, which at the time could not be used to

impeach under Evidence Code section 787. But, as we noted above, Evidence Code section 787 was effectively repealed in 1982 by Proposition 8 insofar as it calls for exclusion of such evidence in criminal cases. (*Harris, supra,* 47 Cal.3d at pp. 1080-1082.) *Wagner,* therefore, is of questionable validity even when limited to its specific facts. (*People v. Lankford* (1989) 210 Cal.App.3d 227, 235-236.)

In any event, we need not reach the merits of this prosecutorial misconduct argument because we conclude Sexton forfeited the claim when he failed to object at trial. The law governing claims of prosecutorial misconduct is well established. Prosecutorial misconduct exists "'under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (*People v. Earp* (1999) 20 Cal.4th 826, 858.) In more extreme cases, a defendant's federal due process rights can be violated when a prosecutor's improper remarks "'"'infect[] the trial with unfairness,'"'" making it fundamentally unfair. (*Ibid.*)

Even so, "'"[a]s a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — *and on the same ground* — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 251-252, italics added; *People v. Avila* (2006) 38 Cal.4th 491, 609 [same].) Here, counsel objected on relevance grounds and to the argumentative form of the questioning. He did not object on burden-shifting grounds. Moreover, he also did not ask the trial court to admonish the jury to disregard the prosecutor's argumentative questioning.

Even though a "defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct" (*People v. Centeno* (2014) 60 Cal.4th 659, 674), Sexton has not established an objection or admonition would have been futile in this case. Indeed, counsel's objection was sustained, so it is probable the trial court would have admonished the jury had it been asked to. The claim was therefore forfeited.

Nor was counsel ineffective for failing to raise this additional objection. He did object to the questioning — an objection that was sustained — and the court's later instructions unambiguously told the jury to disregard evidence to which an objection was sustained. Sexton does not explain how an objection on yet an additional ground would have made a difference when the jury was already told to ignore the prosecutor's questioning. Defense counsel need not make meaningless objections, and counsel is not ineffective for failing to make or pursue a meritless objection or motion. (*People v. Weaver* (2001) 26 Cal.4th 876, 931; *People v. McCutcheon* (1986) 187 Cal.App.3d 552, 558-559 ["Defense counsel need not make futile objections or motions merely to create a record impregnable to attack for claimed inadequacy of counsel"].)

2. *The Prosecutor's Closing Argument Was Not Prejudicial Error*

Sexton next contends the prosecutor prejudicially erred in her rebuttal closing argument by stating Sexton profited by selling drugs to individuals suffering from drug addiction. According to Sexton, this statement was not based on the evidence at trial, and improperly inflamed the passions of the jury. Sexton did object below.

In context, the prosecutor's exact words were: "I just wanted to start out by pointing out the irony of [defense counsel] saying in one sentence that, yes, you can't consider sympathy, but in the same sentence saying, well, feel bad for my client because of all the difficulties that he has had to go through and all these things [] that he has been through. [¶] Now, again, we can all acknowledge that the defendant has had a difficult life but it, unfortunately or fortunately, the law says, look, that has nothing to do with it. We're only here to decide one thing, did the defendant commit a crime on [April 16, 2017]. [¶] Sympathy has nothing to do with it and at the end of the day the defendant at one point made a choice. He made a choice from going from simply using drugs to going to selling drugs and benefiting from people who had similar difficulties and struggles with addiction that he did in profiting so he can continue to use drugs."

At that point, defense counsel objected, stating, "It's improper argument. Misstating testimony." The trial court overruled the objection, but the prosecutor did not return to the theme again.[7]

We need not decide whether the prosecutor erred because even if we assume it was error, we find it was harmless. The issue in this case boiled down to whether the jury believed Sexton or not. He insisted the reason he bought in bulk was that he got a better price — the "Costco effect," as it were. To counter that, the prosecutor suggested a different reason: his motivation was to sell some and use some, helping to ensure a regular and constant supply for himself. Sympathy or antipathy were not part of the analysis; it was a business decision on Sexton's part. There is no likelihood the jurors would have believed Sexton's account had the prosecutor not made her single fleeting reference to his purported customers. If error, therefore, it was harmless.

D. *CALCRIM No. 332 Correctly States the Law*

In a supplemental brief, Sexton argues CALCRIM No. 332 misstates the law and therefore the trial court erred in giving this instruction. Nothing in the record indicates Sexton raised an objection to the instruction. Consequently, we find he has forfeited the claim. In addition, because CALCRIM No. 332 correctly states the law, his trial counsel was not ineffective for failing to object.

As given, the trial court instructed as follows: "Now, in this case a witness, a drug recognition expert, was allowed to testify as an expert and to give opinions. And

---

[7] After the jury retired for deliberations, defense counsel renewed his objection to the prosecutor's statements during closing argument: "My objection is improper argument. . . . I believe the People had stated that Mr. Sexton, he now sells drugs. He benefits by selling drugs to people who are addicted to drugs. [¶] None of that was in evidence. That is vilifying my client. I would say that would be prosecutorial misconduct. Submitted." He did not ask for an additional admonition or instruction be given to the jury. The court stated, "I don't believe that rises to the level of prosecutorial misconduct."

you must consider those opinions, but you're not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. [¶] And, again, in evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. And, in addition, consider that expert's knowledge, skill, experience, training, and education, the reasons the expert gave for an opinion, and the facts or information on which the expert relied in reaching that opinion. [¶] You must decide whether information on which the expert relied was true and accurate. *And you may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.*" (Italics added.)

Sexton faults the highlighted language, which tells the jury it *may* disregard an unreasonable or unsupported expert's opinion instead of instructing the jury it *must* do so. Sexton suggests the word "may" means the jury could rely on an expert opinion lacking evidentiary support. We are not persuaded. Rather, we read the instruction as merely informing the jury they are not bound by expert opinions, but rather are *permitted* to completely disregard expert opinions they find lacking in support and are not required to consider them further.

In any event, CALCRIM No. 332 directly tracks Penal Code section 1127b, which provides: "When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows: Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury *may*, however, disregard any such

opinion, if it shall be found by them to be unreasonable. [¶] No further instruction on the subject of opinion evidence need be given." (Italics added.)[8]

Thus, as given CALCRIM No. 332 accurately states the law codified in the Penal Code, and "[n]o further instruction on the subject of opinion evidence" needs to be given. (Pen. Code, § 1127b.) Sexton insists otherwise, but he provides no authority for disregarding the plain language of the statute or the jury instruction. Indeed, it is settled law that a trial court has a sua sponte duty to follow Penal Code section 1127b, and instruct with either CALCRIM No. 332 or its CALJIC equivalent when expert testimony is presented at trial. (*People v. Reeder* (1976) 65 Cal.App.3d 235, 241 (*Reeder*); *People v. Bowens* (1964) 229 Cal.App.2d 590, 600, disapproved on other grounds in *People v. Mayberry* (1975) 15 Cal.3d 143, 158.)

Sexton maintains that, "as applied to the facts of this case," CALCRIM No. 332 "is contrary to law." But, he fails to explain why the "facts of this case" are different from any other case where an expert opines on possession of drugs for sale.

"A trial court has no sua sponte duty to revise or improve on an accurate statement of law without a request from counsel." (*People v. Lee* (2011) 51 Cal.4th 620, 638 (*Lee*).) Moreover, the "failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*Ibid*.)

In *Lee*, the defendant claimed the trial court's instructions improperly allowed the jury to find he committed an attempted forcible rape even if it concluded his victim "passively acquiesced" in his sexual advances. (*Lee, supra,* 51 Cal.4th at p. 637.) The defendant argued "the trial court had a duty to instruct on its own motion that passive or unexpressed assent can be consent, that 'positive cooperation in an act or attitude as an exercise of free will' does not require any physical or verbal expression of cooperation, and that the alleged victim must express her lack of consent in a manner such that a

---

[8] See also CALJIC No. 2.80, which reads in part: "You *may* disregard any [expert] opinion if you find it to be unreasonable." (Italics added.)

reasonable person would perceive she did not consent." (*Ibid.*) Defendant insisted "the instructions improperly reduced the prosecution's burden of proof and denied him due process of law, a fair trial, the right to present a defense, a trial free from improper lessening of the prosecution's burden of proof, and a reliable and nonarbitrary determination of guilt, death eligibility, and penalty in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16 and 17 of the California Constitution." (*Id.* at p. 638.)

Our Supreme Court concluded the defendant "forfeited this claim by failing to object to the trial court's consent instruction or to request any modification or amplification of it at trial." (*Lee, supra*, 51 Cal.4th at p. 638.) More importantly, "with only minor exceptions, the challenged portion of [the instruction], tracks the language of [the relevant Penal Code section]. . . . As given, [the instruction] correctly expressed the law. If defendant believed the instruction . . . required elaboration or clarification, he was obliged to request such elaboration or clarification in the trial court." (*Ibid*.) So too here. Sexton's instructional error claim was forfeited.

In the alternative, Sexton now argues his trial counsel was ineffective for not objecting to CALCRIM No. 332. Not so. As noted above, CALCRIM No. 332 correctly states the law and "[n]o further instruction on the subject of opinion evidence" needs to be given. (Pen. Code, § 1127b.) Sexton insists otherwise, but he provides no authority for disregarding the plain language of the statute and its concomitant jury instruction.

Since a trial court has a sua sponte duty to follow Penal Code section 1127b and instruct with either CALCRIM No. 332 or its CALJIC equivalent when expert testimony is presented at trial, (*Reeder, supra*, 65 Cal.App.3d at p. 241), defense counsel had no obligation to raise a meritless objection. (*People v. Weaver* (2001) 26 Cal.4th 876, 931; *People v. Memro* (1995) 11 Cal.4th 786, 834.) Sexton has failed to meet his burden of showing ineffective assistance of counsel.

E. *Sexton Forfeited Challenge to the Probationary Term Requiring Him to Submit His Electronic Devices to Warrantless Searches and Seizures Was Forfeited*

Sexton next challenges the probation condition requiring him to submit his electronic devices for warrantless searches, claiming it is unconstitutionally overbroad. At the sentencing hearing, after granting Sexton probation the trial court stated: "You'll be on search and seizure terms. You'll also be required to provide any security codes, passwords for any electronic devices in your possession. You'll be subject to search and seizure terms, of course." The docket entry shows the specific term was the following: "The probationer shall provide all passwords to any electronic devices (including but not limited to cellular telephones, computer or notepads) within his or her custody or control and shall submit said devices to search at any time without a warrant by any peace officer."

Sexton did not object to the condition. Indeed, the record shows he waived a probation and sentencing report, and accepted the court's terms and conditions of probation.

"Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) "The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions." (*Ibid.*) One of the primary goals of probation is to ensure the public's safety via enforcement of the probationer's conditions. (*Ibid.*; *People v. Moran* (2016) 1 Cal.5th 398, 402-403.) A court has broad power when "making a probation determination, to impose any 'reasonable conditions, as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer . . . .'" (*People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting Pen. Code, § 1203.1, subd. (j).)

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights . . . ." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 (*E.O.*).)

Because "perfection in such matters is impossible," there will necessarily be some infringement on a defendant's rights. (*E.O., supra,* 188 Cal.App.4th at p. 1153.) Even so, infringement is permissible because probationers are not entitled to the same basic liberties as ordinary citizens. (*United States v. Knights* (2001) 534 U.S. 112, 119.) "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*Ibid*.) We review constitutional challenges to probation conditions de novo. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723.)

"In general, the failure to make a timely objection to a probation condition forfeits the claim of error on appeal. [Citations.] 'A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence.' [Citation.] An objection may be raised for the first time on appeal only where it concerns an *unauthorized sentence involving pure questions of law*. [Citations.]" (*People v. Relkin* (2016) 6 Cal.App.5th 1188, 1194-1195, italics added.)

In *Sheena K, supra*, the California Supreme Court explained that not "'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that

can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.]'" (*Sheena K., supra,* 40 Cal.4th at p. 889; see also *In re P.O.* (2016) 246 Cal.App.4th 288, 297-298 [minor's overbreadth claim did not present a pure question of law].)

Here, Sexton's overbreadth claim does not present a pure question of law because it would require us to evaluate the underlying — and not fully developed — facts relating to the current offense and Sexton's admitted long history of drug abuse and addiction. And without a probation and sentencing report to assist us in assessing those underlying factual issues, we have nothing to evaluate.

Sexton attempts to avoid this consequence by relying on inapplicable federal authority. He cites *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, but that case did not involve the issue of whether a defendant forfeited his ability to challenge on appeal a probationary term by failing to object. Instead, the question there was whether a later search of a probationer's cell phone was unreasonable "in the circumstances of [the subsequent] case." (*Id.* at p. 612.)

In *Lara,* the defendant's underlying search and seizure probation term was generic, and not sufficiently clear to have apprised him it included electronic devices. (*Lara, supra,* 815 F.3d at p. 610.) The *Lara* court "recognize[d] that [defendant's] privacy interest was *somewhat diminished* in light of [his] status as a probationer. But it was not diminished or waived" because the defendant did not accept "as a condition of his probation a clear and unequivocal search provision authorizing cell phone searches" (*Id.* at p. 612, italics added.)

Unlike the defendant in *Lara*, here Sexton's electronic device probationary term is quite specific and fully informs him not only of what may be searched, but also requires him to surrender passwords, account names and numbers, and the information providing access. Moreover, *Lara* involved a subsequent probation search, and whether it was unreasonable, and not whether the probationary term itself was unconstitutionally

overbroad. *Lara* provides no support to Sexton. (See also *People v. Sandee* (2017) 15 Cal.App.5th 294, 304 [rejecting *Lara* because it does not follow the approach approved by the California Supreme Court for assessing the constitutional validity of a probation search term].)

Sexton argues the electronic search condition "exceeds the bounds of what is reasonably related to the state's interest in the rehabilitation of appellant . . . ." But any analysis of this point would require we analyze Sexton's current crimes, his past struggles with drug addiction, and in light of the quite salient fact he admitted to using his cell phone to text and call his drug contacts.

Sexton insists "no evidence was presented that appellant's convictions for possession of controlled substances for sale involved electronic devices or social media." We disagree. By testifying he used his cell phone to communicate with his drug contacts, Sexton admitted he used his electronic devices to violate the drug laws. Simple possession of methamphetamine and heroin may only be misdemeanor offenses, but they are still illegal. Thus, another of Sexton's terms of probation is that he "violate no law," and probationary supervision would necessitate his compliance with this term as well.

In any event, even to begin an inquiry into an overbreadth claim in this matter would require us to assess facts not before us, and is therefore not purely a question of law. Evaluating Sexton's claim his probationary condition was unreasonable or unconstitutional under the circumstances of this case necessarily depends on facts for which the record is undeveloped due to Sexton's own failure to raise the issue in the trial court. He therefore has forfeited the issue. (*Sheena K.*, *supra*, 40 Cal.4th at p. 889; cf. *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1525 ["in order to avoid forfeiture, the defendant must have objected on the 'specific grounds' asserted as error on appeal"].)

F. *There Was No Cumulative Error*

In his final claim, Sexton contends we must reverse the judgment due to the cumulative effect of each of his assigned errors on appeal. Because we have rejected his

individual claims of error, or found them forfeited, there is no error to cumulate, and his claim of cumulative error fails. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316; cf. *People v. Seaton* (2001) 26 Cal.4th 598, 692.)

III.

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.